(3)

No. 08-1156

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC AND
AT&T MOBILITY CORPORATION,
Petitioners,

v.

CHARLENE SHORTS AND
PALISADES COLLECTIONS LLC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT PALISADES COLLECTIONS LLC IN SUPPORT OF PETITIONERS

WILLIAM DAVID WILMOTH
Counsel of Record
STEPTOE & JOHNSON PLLC
1233 Main St., Suite 3000
P.O. Box 751
Wheeling, WV 26003-0751
(304) 231-0456

Counsel for Palisades Collections LLC

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

The respondent Palisades Collections LLC ("Palisades") adopts Petitioners' recitation of the question presented.

RULE 29.6 STATEMENT

Respondent Palisades Collections LLC, a Delaware Limited Liability Company, is a wholly owned subsidiary of a privately held company, Asta Funding, Inc.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

CASES — Page(s)

STATUTES

IN THE

Supreme Court of the United States

No. 08-1156

AT&T MOBILITY LLC AND
AT&T MOBILITY CORPORATION,
Petitioners,

v.

CHARLENE SHORTS AND
PALISADES COLLECTIONS LLC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT PALISADES COLLECTIONS LLC IN SUPPORT OF PETITIONERS

Respondent Palisades Collections, LLC ("Palisades") respectfully submits this brief in support of the Petition for a Writ of Certiorari.

INTRODUCTION AND SUMMARY

In the summer of 2006, Palisades filed a collection action against the respondent, Charlene Shorts ("Shorts") in the Magistrate Court of Brooke County,

West Virginia, in order to recover $794.87 for an early termination fee and other charges relating to Shorts' cellular telephone service with AT&T Wireless Services, Inc. Shorts filed an Answer denying the allegations of the Complaint. She also asserted a Counterclaim against Palisades claiming violations of the West Virginia Consumer Credit and Protection Act, §§46A-6-04 *et seq.* (LexisNexis 2006). Nearly a year later, Shorts filed a First Amended Counterclaim joining AT&T Mobility ("ATTM") as an additional counterclaim defendant.

Thereafter, ATTM timely removed the case to the United States District Court for the Northern District of West Virginia. Shorts filed a Motion to Remand arguing that ATTM had no right to remove under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4. Essentially, Shorts argued that ATTM could not remove the case to federal court because it was not a "defendant" under the General Removal Statute, 28 U.S.C.A. §1441. The district court granted Shorts' Motion and remanded the case to state court, ruling that ATTM could not remove the case to federal court because (a) ATTM was ". . . not a 'defendant' for purposes of removal under §1441," and (b) CAFA does not create any independent removal authority that would allow ATTM to " . . . circumvent the long-standing requirement that only a true defendant may remove a case to federal court." Pet. App. 38a-59a.

In short, Shorts morphed a small claims court debt collection action into a proposed class action potentially encompassing more than 160,000 class members and putting at least $16 million in controversy, *id.* 20a-21a, and the district court refused jurisdiction.

A sharply divided panel of the Court of Appeals for the Fourth Circuit affirmed the remand and held that removal was improper because ATTM was a counterclaim defendant and not a defendant.

Strongly in dissent, Judge Niemeyer explained that the majority's holding was against the very purpose and text of CAFA, which allows "any" defendant to seek removal. *Id.* 23a (citing 28 U.S.C.A. §1453(b)). Judge Niemeyer also dissented from the denial of a rehearing *en banc*, declining to request a poll of the Court because he "prefer[red] to release this case to the early consideration of the Supreme Court." *Id.* 36a-37a

Palisades agreed to the removal to federal court. Palisades now finds itself transformed from a collection agency attempting to recover less than $800 in small claims court to a defendant in a massive class action, and therefore had and has no objection to continuing in federal court, where CAFA seems to say it belongs.

SUMMARY OF ARGUMENT

Palisades agrees with and adopts the reasons cited in the Petition for a Writ of Certiorari filed by ATTM and the *amicus* brief filed by the Chamber of Commerce of the United States ("Chamber of Commerce").

Palisades also asserts that this Court should grant the Petition and review the ruling below for the following additional or supplemental reasons:

1. The opinion of the majority below relies on an incorrect construction of CAFA and an improper reading of CAFA alongside the General Removal Statute.

2. The ruling below circumvents the clear intent of Congress when it passed CAFA.
3. The ruling below is inconsistent with rulings of other courts of appeals, and this Court should resolve the inconsistencies.
4. This Court should avail itself of the opportunity to explain the scope of its 1941 decision in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

ARGUMENT

Palisades agrees with and adopts each of the arguments set forth in the Petition for Writ of Certiorari filed by ATTM regarding the proper construction of CAFA and the suitability of this case to resolve the disparate rulings of the Courts of Appeals across this country. 28 U.S.C. §1441(a) sets forth the general rule for removal authority, that civil actions "...of which the district courts of the United States have original jurisdiction, may be removed by *the* defendant or *the* defendants." (Emphasis added). This language is important to an understanding of both the rule that *all* defendants must unanimously consent to removal, *see Chicago Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245, 247 (1900), and the rule that only *original* defendants can remove, *see Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106-108 (1941).

However, 28 U.S.C. §1453(b), which was added by CAFA, sets forth a clearly different rule for removal of class actions over which the district courts have removal jurisdiction.

Specifically, §1453(b) provides as follows:

> A class action may be removed to a district court of the United States in accordance with section 1446(except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

In *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005), this Court shed light on the proper construction of jurisdictional statutes. Courts are directed to follow the statute's plain meaning. As Justice Kennedy explained, jurisdictional statutes should not be given "a more expansive interpretation than their text warrants," nor should they be given "an artificial construction that is narrower than what the text provides." *Id.*, 545 U.S. 558. This Court should analyze the jurisdictional provisions in 28 U.S.C. §§1441 and 1453(b) against this backdrop.

§1453(b) states unequivocally that "a class action *may be removed* . . . " 28 U.S.C. §1453(b) (Emphasis added). This unambiguous language is similar to language in other federal statutes that courts have found to confer independent jurisdictional grounds. For example, 28 U.S.C. §1442, the "federal officer removal" statute, similarly provides "a civil action or criminal prosecution commenced in State Court against [the United States, its agencies, or its officers] *may be removed*." 28 U.S.C. §1442; *IMFC Prof'l Servs. of Fla., Inc. v. Latin Am. Home Health, Inc.*, 676 F.2d 152, 156(5th Cir.1982) (stating that "1442 itself grants independent jurisdictional grounds over cases involving federal officers where a district court otherwise would not have jurisdiction"). *See also* 28

U.S.C. §1443, which provides that certain state court actions where the defendant relies on Federal Civil Rights law for its defense "*may be removed*". The plain language of these provisions, particularly Congress' choice of the passive voice, authorizes removal of these actions regardless of the label placed on the removing defendant.

Second, as the *amicus* brief filed by the Chamber of Commerce suggests, the decision of the Fourth Circuit vitiates the clear intent of the legislative branch when CAFA was passed. Left undisturbed, the opinion of the majority below, coupled with the "counterclaim class action" strategy described in the Petition, will circumvent CAFA's thrust and return America to the "bad old days" of class action abuse.

Third, as is reflected in the *amicus* brief of the Chamber of Commerce, the decision of the majority below is inconsistent with the holdings of other courts of appeals that each of the defendants in a class action should be viewed separately. In other words, other courts of appeals have ruled that the actions of one defendant in multi-defendant class actions should have no bearing on the ability of another defendant to remove under CAFA. As the statute says, "*any defendant*" may remove.

Fourth and last, this Court should grant the Petition and review this case because it gives the Court a great opportunity to explain the scope of *Shamrock Oil*, 313 U.S. 100, which has, since 1941, been susceptible to different and inconsistent interpretations by the lower courts of this country, as to whether the *Shamrock Oil* rule applies to counterclaim defendants, such as Petitioners, who were not parties in the original action.

Palisades argues, as did the Chamber of Commerce in its *amicus* brief, that *Shamrock Oil* does not extend to CAFA removals. But even if it did, review by this Court would be proper and advisable because the Circuits are split on the applicability of the *Shamrock Oil* rule where, as in this case, the counterclaim defendant was not a party to the original action, and timely removed after it was brought in as a counterclaim defendant. *Any* defendant does not have to mean *any original* defendant.

CONCLUSION

For the foregoing reasons, and for the reasons cited by Petitioners and by the *amicus curiae*, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

WILLIAM DAVID WILMOTH
Counsel of Record
STEPTOE & JOHNSON PLLC
1233 Main St., Suite 3000
P.O. Box 751
Wheeling, WV 26003-0751
(304) 231-0456

Counsel for Palisades Collections LLC

May 22, 2009